Supreme Court, U.S.
FILED
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92-555

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM PAUL, Petitioner

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURTOF APPEALS FOR THE
EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a railroad employee's off-duty conduct constitute contributory negligence within the meaning of the Federal Employer's Liability Act, (FELA) 42 U.S.C. §51 et seq.

LIST OF THE PARTIES

The parties to the proceedings below were the petitioner, William Paul and the respondent, Missouri Pacific Railroad Company.[1]

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[1]Missouri Pacific Railroad Company has merged with Union Pacific Railroad, but retains and continues to use the name Missouri Pacific Railroad Company.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM PAUL, Petitioner

v.

MISSOURI PACIFIC RAILROAD COMPANY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, William Paul, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on April 28, 1992. (Petition for rehearing filed pursuant to FRAP 40 denied on June 12, 1992)

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 963 F.2d 1058 and is reprinted in the appendix hereto, p. 1a, infra.

The judgment on jury verdict United States District Court for the Eastern District of Arkansas has not been reported. It is reprinted in the appendix hereto, page 3-A infra.

JURISDICTION

Invoking jurisdictional under 42 U.S.C. §51 et. seq. (FELA), and 28 U.S.C §1331, the petitioner brought this suit in the United States District Court for the Eastern District of Arkansas, Western Division seeking damages for negligence against respondent. Following trial by jury, judgment was entered on the jury verdict in favor of respondent.

On petitioner's appeal, the Eighth Circuit entered judgment and an opinion affirming the District Court's judgment on April 28, 1992. Petitioner filed a Petition for Rehearing, which was denied on June 12, 1992.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provision of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. 45 U.S.C. §53

STATEMENT OF CASE

Petitioner, William Paul, has been an employee of the Missouri Pacific Railroad since 1957, working as a switchman and brakeman. (T-122) Over the course of his employment, he was exposed to loud noises on a daily basis. Unprotected exposure to the noise levels occurring on trains and in railroad yards has been connected with hearing loss. The respondent railroad did not make available hearing protective devices until approximately 1987, and once available, Mr. Paul wore the devices while on the job. (T-144-145)

During the past twenty (20) years, Mr. Paul engaged in squirrel and deer hunting using a 20 gauge shot gun for squirrel hunting and a .270 rifle for deer hunting. Although he hunted on the average of seven (7) times per year, there were years he did not even fire his .270 rifle. (T-152, 153)

While hunting, petitioner sometimes wore hearing protection but did not on all occasions. There was no indication he knew he could suffer loss of hearing by not wearing the protection.

Mr. Paul sustained a hearing loss primarily in his left ear which was caused, at least in part, by the noise he was exposed to on the job. (T-333, 339) On March 2, 1990 he filed an action, in federal district court, under the Federal Employers Liability Act, seeking to recover damages for his permanent noise induced hearing loss.

At trial, the jury was instructed on contributory negligence. The district court deleted the words "on the job" from the instruction, allowing the jury to consider whether petitioner's recreational hunting activities constituted contributory negligence. (T-522, 597) The jury returned

a general verdict form finding in favor of defendant,[2] and judgment was entered thereon. (App. 4-A, 5-A)

The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court, holding that in an FELA action where the injury claimed is a product of a long time occupational exposure to an injury producing condition, the district court may give a contributory negligence instruction on activities engaged in by plaintiff which are unrelated to his employment. (App. 1-A, 3-A)

Paul filed a petition for rehearing and a suggestion of appropriateness of a

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[2] During deliberation, the jury expressed confusion by sending a note to the court stating "Regarding Instruction Number 3, if we find the evidence is equally balanced, it is our understanding that we rule in favor of the Defendant. Is this correct? "Instruction Number 3 was the Burden of Proof instruction.

rehearing en banc which was denied on June 12, 1992. (App. 2-A)

REASONS FOR GRANTING THE WRIT

I.

The decision below allowing a railroad employee's off duty conduct to be considered as contributory negligence in FELA cases raises important problems which will adversely affect, not only all pending and future FELA cases, but all federal statutory negligence actions, and is an improper interpretation of the FELA.

In the United States, from 1876 to 1988, there were 477,273 reported non train incidents, involving railroads. This figure includes occupational illness incidents. In 1988 alone, over 27,054 injuries were reported from railroad accidents and incidents, and some believe those figures reported by the Federal Railroad Association are underestimated. The Role of the Federal Employer's Liability Act in Railroad Safety, 19 Transportation Law Journal Page 381.

The statistics are startling in that they reveal the dangers associated with the railroad industry persist and injuries continue to occur with great frequency. It was an ever increasing number of railroad workers injuries which led to the enactment in 1902 of the Federal Employer's Liability Act, 45 U.S.C §51 et seq., and the fact that injuries continue to occur at a high rate indicates the statute is still needed to protect railroad workers.

While the injury and incident figures cited herein do not segregate railroad employee injuries from injuries to other persons, an increasing number of FELA cases are filed in state and federal courts each year based on injuries to railroad workers. Among a wide array of injuries; hearing loss cases have been filed in increased numbers. In 1991, for example, there were approximately 5,000 hearing loss cases

pending in the federal and state courts, 129 New Jersey Law Journal Page 74, Column 1, September 19, 1991.

The Court of Appeals decision in this case has the potential to affect all of these cases as well as those cases brought under other federal negligence statutes, including The Jones Act, 46 U.S.C. 688, The Federal Tort Claims Act, 28 U.S.C. §2671 and Death on High Seas Act, 46 U.S.C. §761, to name a few. If this decision is not reviewed, countless plaintiffs will be improperly precluded from recovery due to a standard of contributory negligence not previously recognized by this Honorable Court or any other circuit.

Contributory negligence under 45 U.SC. §53 has been defined as:

> The doing of some act or an omission by the employee amounting to a want of ordinary care for his own safety, which is the proximate cause of his injury

> though concurrent with some negligent act of the employer, and refers to whether the employee acted prudently in connection with matters arising for his consideration during the course of his employment and under circumstance not contemplated by him as a part of the employment. Chesapeake & O. Ry. Co. v. Richardson, 116 F.2d 860 (Cir. 1941)

The FELA is a remedial statute, enacted at the turn of the century to provide a response to the increasing number of work related injuries which were occurring in the railroad industry. In re Second Employer's Liability Cases, 223 U.S. 1, 32 S.Ct 169, 56 L.Ed 327 (1912). Congress was disappointed with the common law duty of the employer to his employee and established a standard which enlarged railroad workers' rights when injured on the job.

This Court in Rogers v. Missouri Pac. R. Co., 352 U.S 500, 77 S.Ct. 443, 1 L.Ed.

2d 493 (1957), rehearing denied 353 U.S. 943, 77 S.Ct 808, identified the standard of liability to be: "whether the negligence of the employer played any part, even the slightest, in producing the injury or death, which is the subject of the suit." Rogers at 77 S.Ct. 448.

The purpose of the FELA thus, is "to provide liberal recovery for injured workers," Kerman v. American Dredging Co., 355 U.S. 426, 437, 78 S.Ct. 394, 398, 2L.Ed. 2d.382 (1958). The Act has been consistently interpreted in a liberal manner so as to fulfill congressional intent by federal and state courts. For example Green v. River Terminal Ry. Co., 763 F.2d 805 (6th Cir. 1985); Chapman v. Union Pacific R.R., 237 Neb. 617, 467 N.W. 2d 388 (1991). Petitioner's research has failed to uncover any judicial authority for limiting the scope of the FELA.

Where Congressional intent has been so clearly and firmly established, courts are bound by that intent and are not free to restrict or modify it directly or indirectly. In Miles v. Apex Marine Corporation, U.S. Ct. 317, 1121 L.Ed 2d 375 (1990), an admiralty case, the respondent argued that The Jones Act could be supplemented by admiralty courts as to the type of damages allowed. This Court rejected that argument, holding where Congress speaks to an issue, the courts are not free to supplement "Congress' answer so thoroughly that the Act becomes meaningless", citing Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625, 98 S.Ct. 2040, 56 L.Ed. 2d 581 (1978).

The issue of what constitutes contributory negligence under 45 U.S.C. §53 has always been applied in the context of some conduct occurring in the workplace.

The court below recognized this in its opinion but then went on to supplement the statute by expanding the definition of what constitutes contributory negligence in occupational exposure FELA cases.

Prosser and Keaton on the Law of Torts, §65 page 451 defines contributory negligence as "a careless act or omission on the plaintiff's part tending to add new damages to conditions that the employer negligently created or permitted to exist". This definition has been applied to FELA cases and is consistent with acts of a plaintiff which are committed in the workplace.

The Eighth Circuit Court of Appeals, however, broadened the definition to allow consideration of every act and its surrounding circumstances in an FELA employee's past which may have had an effect on his injury. Even under common

law negligence (See Argument II, infra) this is not permitted.

The decision below represents a judicial restriction on an FELA plaintiff's remedies. The Court overstepped its boundaries with respect to interpretation of the FELA, in that the decision does not effectuate congressional intent.

II.

The decision below, which affirmed the submission of a contributory negligence instruction, based on conduct unrelated to petitioner's employment creates a precedent which conflicts with the intent and purpose of the Federal Employer's Liability Act and basic principles of common law negligence.

This petition for writ of certiorari is not being sought on grounds that a direct conflict exists between the decision below and specific decision of other federal circuits. However, the decision below does in fact conflict with judicial case law of other circuits sub silentio.[3]

The definition of contributory

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[3]There is dicta in one case, Taylor v. Burlington Northern Railroad Company, 787 F.2d 1309 (9th. Cir. 1986) that evidence of drug use may bear on the issue of contributory negligence, but the court found the evidence to be speculative and inadmissible.

negligence and the intent of congress in enacting the FELA have been discussed under Argument I. Those portions of the previous argument are relevant to this argument as well, in that the firmly established concept of contributory negligence has been drastically changed by the decision below.

The Eighth Circuit's holding has blurred the distinction between a preexisting condition and contributory negligence. The two are totally distinct concepts and while a preexisting condition is relevant in terms of being a contributing cause, it does not defeat or reduce an FELA plaintiff's right to recovery. It is only where the employee's negligence is the sole cause of the injury that the employer escapes liability. Meyers v. Union Pacific R. Co., 738 F.2d 328, 331 (8th Cir. 1984).

Equating evidence which is relevant to

show a concurrent cause with contributory negligence is incongruent under the FELA and under common law negligence. For example, in asbestos cases, evidence of a plaintiff's smoking habit is relevant but hardly would justify an instruction on contributory negligence. Application of the lower courts interpretation of contributory negligence will produce absurd results. For instance, a contributory negligence instruction could arguably be allowed where there was evidence that the plaintiff attended an athletic event in an arena where the noise was at excessive levels, or where there was evidence that a plaintiff had been in numerous traffic jams where excessive noise was being caused by automobiles and other motor vehicles. Such rulings would represent a complete departure from the entire line of cases interpreting the FELA.

It is not simply a question of semantics, i.e. labeling the conduct a pre-existing or concurrent condition vs. contributory negligence. It goes to the very heart of the burden of proof and elements required to establish negligence. Moreover, if the plaintiff under the liberally construed FELA is held to be contributorily negligent on the basis of an activity unrelated to his employment, there must be some evidence that he knew or should have known that to engage in this activity would result in a hearing loss. In other words, if a contributory negligence instruction is introduced into the case, then the defendant has the burden of proving negligence. This was not done in the instant case.

The prejudicial effect of allowing a contributory negligence instruction for conduct unrelated to a plaintiff's

employment is obvious. The court below, in an earlier decision recognized this in reversing a district court case when a contributory negligence instruction was given where there was no evidence to support it. Wilson v. Burlington Northern, Inc., 870 F.2d 780 (8th Cir. 1982). The Court held it was prejudicial due to the risk of confusing the jury.

The jury which heard petitioner's case was indeed confused by the submission, as indicated by their question of whether it was correct to find in favor of defendant, if they found the evidence was equally balanced. Such confusion was clearly prejudicial to petitioner's case and would likewise be prejudicial under any case where evidence of a plaintiff's conduct was unrelated to his employment.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

BY: _____

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September 10, 1992

APPENDIX

1-A Opinion of United States Court of Appeals for the Eighth Circuit

2-A Order Denying Petition for Rehearing

3-A Judgment Affirming the District Court Judgment

4-A District Court Judgment on Jury Verdict

5-A Jury Verdict Form

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-2364

William Paul, *
*
Appellant, *
* Appeal from the
United * the United
* States
v. * District Court
* for the
States District Court * Eastern
for the Eastern District * District of
Missouri Pacific Railroad * Arkansas
Company, *
*
Appellee. *

Submitted: January 10, 1992

Filed: April 28, 1992

Before JOHN R. GIBSON, BOWMAN, Circuit
Judges, and LIMBAUGH, * District Judge.

BOWMAN, Circuit Judge.

William A. Paul brought this action against his employer, Missouri Pacific Railroad (MoPac), under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988) (FELA). Paul alleges that MoPac negligently exposed him to dangerously excessive levels of noise during his thirty-four years of service and caused him to suffer permanent hearing loss. A jury returned a general verdict for MoPac and the District Courtt[1] entered judgment on this verdict, dismissing the case with prejudice.

On appeal, Paul contends the District Court erred in submitting to the jury the question of his alleged contributory negligence and that the court committed

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[1]The Honorable Susan Webber Wright, United States District Judge for the Eastern District of Arkansas.

several errors on evidentiary matters during the trial. For the reasons stated below, we affirm the judgment of the District Court.

I.

The relevant facts are largely beyond dispute. Paul went to work for MoPac in 1957 as a switchman and brakeman and continued there until the time of the trial of this action against MoPac. Hearing protection devices were not made available to Paul at work until 1987, despite Paul's evidence that MoPac should have known as early as 1966 that the noise levels were potentially harmful. Once protective devices were available, Paul wore them at all times while on the job. Paul was also an avid hunter and he testified to regular, recreational use of

small and large caliber rifles over the last twenty years. He admitted that he did not always wear hearing protection when he fired his rifles. Paul's otolaryngologist, Dr. Dickins, testified Paul had sustained a mild high-frequency hearing loss in his left ear and that the hearing in his right ear was normal for a man of Paul's age. Paul also testified that he suffers from a persistent ringing in his left ear (tinnitus).

At trial, MoPac sought to prove that Paul's hearing loss was not caused by any negligence on its part, but rather was caused solely by Paul's recreational use of firearms. MoPac further sought to prove that Paul's recreational use of firearms without hearing protection was unreasonable and constituted contributory negligence. The District Court, over Paul's timely and specific objection,

instructed the jury on the issue of Paul's contributory negligence[2] and the jury returned a general verdict in favor of

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[2]The District Court gave, as its Instruction No. 11, a general contributory negligence instruction based on 3 Edward J. Devitt, et al., Federal Jury Practice and Instructions / 94.15 (4th ed. 1987). The District Court further instructed the jury, in Instruction No. 12, that:

> You must find the plaintiff contributorily negligent if the defendant has proved all the following elements by the preponderance of the evidence:
>
> First, the plaintiff filed to protect himself from exposure to harmful noise in his recreational activities.
>
> Second, the plaintiff was thereby negligent.
>
> And third, such negligence of the plaintiff directly contributed to causing his injury.
>
> If any of the above elements have not been proved by the preponderance of the evidence then the plaintiff was not contributorily negligent.

Trial Transcript at 597 (emphasis added)

MoPac.

II.

Paul alleges the District Court erred in instructing the jury on the issue of contributory negligence. Paul argues there was no evidence of any negligence on his part at work and therefore the jury should not have been allowed to consider this issue.

Under FELA, contributory negligence is an affirmative defense on which the defendant employer has the burden of proof. Wise v. Union Pac. R.R., 815 F.2d 55, 57 (8th Cir. 1987). The defendant is entitled to have the jury instructed on this defense if there is "any evidence to support that theory." Meyers v. Union Pac. R.R. 738 F.2d 328, 331 (8th Cir. 1984). In analyzing Paul's claim of error regarding the contributory negligence instruction, this Court must review the

record to determine whether a sufficient evidentiary basis had been established to warrant giving the instruction. Wise, 815 F.2d at 57; Meyers. 738 F.2d at 330-31.

Our review of the record has convinced us that the District Court was correct in finding that " [t]here has been no evidence that the plaintiff was himself negligent on the job." Trial Transcript ("Tr.") at 522. The court decided to give the challenged instruction, however, because "the issue is the ordinary care owed by the railroad to protect the plaintiff's hearing and likewise it's his own ordinary care to protect his hearing, whether it be on the job or off the job." Tr. at 519. Thus the question is narrowly presented: is evidence of a plaintiff's off-duty activities, which were arguably careless and may have contributed to his claimed injury, sufficient to warrant a

contributory negligence instruction in a FELA case?

The parties have not presented, nor has our research revealed, a case that addresses the definition of contributory negligence in a fact situation similar to this one. The definitions that have been employed by this Court naturally reflect the circumstances giving rise to them. In Birchem v. Burlington N. R.R., 812 F.2d 1047 (8th Cir. 1987), we quoted the statement of then-Judge Kennedy of the Ninth Circuit that: " [c] ontributory negligence . . . is a careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist." Id. at 1049 (quoting Taylor v. Burlington N. R.R., 787 F.2d 1309, 1316 (9th Cir. 1987)) (emphasis by Birchem panel omitted). This definition captures

the necessary elements when the negligence of the defendant and the negligence of the plaintiff combine to create a single situation from which a sudden and indivisible injury arises. The injuries in Birchem were the products of this type of sudden event. See id. at 1048 (plaintiff injured his back when an unlatched door swung open, striking him, and again while operating a machine).

Similarly, this Court has approved an instruction which defined contributory negligence as "fault on the part of a person injured, which cooperates in some degree with the negligence of another, and so helps to bring about the injury." Flanigan v. Burlington N., Inc., 632 F.2d 880, 886 (8th Cir. 1980), cert. denied, 450 U.S. 921 (1981). This definition, which emphasizes the causation aspect of contributory negligence, was deemed

adequate in Flanigan where the employee failed to follow a safety procedure to notify others of his presence and was run over when the car he was inspecting was moved without warning. Id. at 882.

Definitions that were created to address sudden, injury-producing events are ill-suited to the present situation where the plaintiff's injuries are claimed to be the product of long-term, occupational exposure to an injury-producing condition. This does not mean, however, that the defense of contributory negligence is to have no application in the growing area of occupational-exposure litigation under FELA. Congress provided, through the contributory negligence defense set forth in 45 U.S.C. § 53, the only means for an employer to avoid liability for the full amount of an employee's damages where its negligence

caused only a part of the injury. See id. (stating this section governs use of contributory negligence in "all actions" brought under FELA). Because the injury in the ordinary FELA case is the product of a sudden and isolated event, the contributory negligence defense usually has been seen in terms of whether the plaintiff's unreasonable behavior contributed to creating this event. In the present case, however, where the injury arises from the defendant's alleged long-term disregard for an interest of the plaintiff (here, his hearing), we see no reason why the defense of contributory negligence should not have application where there is evidence the plaintiff likewise has shown long-term disregard for the same interest.

The Court is aware of the apparent incongruity of charging a plaintiff's off-

duty conduct as contributory negligence. It has often been said that "an employee in a FELA action has a duty to use reasonable care in the workplace." Ackley v. Chicago & N. W. Transp. Co., 820 F.2d 263, 267 (8th Cir. 1987) (emphasis added). There has been an almost total lack of discussion in FELA decisions, however, of the duty to use reasonable care to protect oneself away from work. Where the issue has been raised, it has been addressed in terms other than "duty." See Taylor, 787 F.2d at 1314 (reversible error to refuse contributory negligence instruction where plaintiff's off-duty drug use "may have played a part in causing [plaintiff's] mental collapse"); Farmer v. Pennsylvania R.R. 311 F. Supp. 1074, 1077 (W.D. Pa. 1970) (plaintiff seeking damages for tuberculosis not contributorily negligent where no evidence

was admitted to show that his long-term smoking was negligent). This incongruity is, however, more likely the fault of the terminology employed rather than the purposes being served:

> It is perhaps unfortunate that contributory negligence is called negligence at all. "Contributory fault" would be a more descriptive term. Negligence as it commonly understood is conduct which creates an undue risk of harm to others. Contributory negligence is conduct which involves an undue risk of harm to the actor himself. Negligence requires a duty, an obligation of conduct to another person. Contributory negligence involves no duty, unless we are to be so ingenious as to say the plaintiff is under an obligation to protect the defendant against liability for the consequences of plaintiff's own negligence.
>
> W. Page Keeton et. al., Prosser and Keeton on the Law of Torts § 65, at 453 (5th ed. 1984) (footnotes omitted).

In the present case, Paul contends that MoPac was unreasonable in exposing

him to harmful noise levels at work over a substantial period of time. There was also evidence from which the jury could have determined that Paul was unreasonable, during the same long-term period, in failing to protect himself from the same danger created by his recreational use of firearms. Any hearing loss caused by one of these negligent exposures would be indistinguishable from and perhaps subsumed by, a loss from the other. Thus, we are persuaded that the policy expressed in 45 U.S.C. § 53, that a FELA plaintiff shall not recover for that proportion of his injuries attributable to his negligence, must find expression in this case. We hold, therefore, that where, as here, a plaintiff complains of long-term employer disregard resulting in injury to a specific interest for which

there is evidence that the plaintiff also has shown a long-term disregard, it is not error to give a contributory negligence instruction.

A distinction needs to be sharply drawn, by the litigants and for the jury, between the affirmative defense of contributory negligence and the plaintiff's burden of proving causation. This distinction is even more critical when the same evidence is proffered to raise the former and rebut the latter. Under FELA, the plaintiff carries only a slight burden on causation. The plaintiff need only prove that "employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought." Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506 (1957). On this issue, the evidence of Paul's recreational activities, while not

dispositive, is relevant. It goes to show, however persuasively and to whatever degree, that the plaintiff's injuries were not caused, even in the slightest, by the negligent acts of the defendant. If the plaintiff fails to sustain his burden on causation, if the jury finds that the defendant's negligence caused no part of the injury, the verdict must be for the defendant. See Grand Trunk W. Rv. v. Lindsay, 233 U.S. 42, 47 (1914) ("'It is only when plaintiff's act is the sole cause -- when defendant's act is no part of the causation -- that defendant is free from liability'") (quoting Grand Trunk W. Rv. v. Lindsay, 201 F. 836, 844 (C.C. Ill. 1912)).

If, however, the jury finds even a partial causal connection between the employer's negligence and the employee's

injury, then the employer is liable for the employee's damages. Rogers, 352 U.S. at 506. Only then may damages be reduced, in an appropriate case, in proportion to the employee's fault or contributory negligence. 45 U.S.C. § 53. On this issue as well, the evidence of Paul's recreational activities is relevant and, as we have held, sufficient to submit the question of contributory negligence to the jury. In so holding, we merely place in the jury's hands the opportunity to apportion the damages between the parties according to their respective degrees of fault.

III.

We have examined Paul's other contentions of error and find them to be unpersuasive. We have held that "[t] he district court has a large amount of discretion over the admissibility of

evidence in FELA cases." Naylor, 847 F.2d at 1307. We will reverse the determination of a district court on these matters only on a showing of an abuse of this discretion. Meyers, 738 F.2d at 332-33. Our review of the record in this case reveals no such abuse by the District Court.

IV.

For the reasons stated, we affirm the judgment entered by the District Court on the jury's general verdict in favor of the defendant.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2364EALR

William Paul,	*	
	*	
Appellant,	*	
	*	Order Denying
vs.	*	Petition for
	*	Rehearing and
Missouri Pacific	*	and Suggestion
Railroad Company,	*	for Rehearing
	*	En Banc
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

June 12, 1992

Order Entered at the Direction of the Court:

s/Michael E. Gaus

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2364EALR

William Paul,	*	
	*	
Appellant,	*	Appeal from the
	*	United States
vs.	*	District Court
	*	for the Eastern
Missouri Pacific	*	District of
Railroad Company,	*	Arkansas.
	*	
Appellee.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

April 28, 1992

Order Entered in Accordance with Opinion:

s/Michael E. Gaus

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

WILLIAM PAUL, PLAINTIFF,

vs. LR C 90 135

MISSOURI PACIFIC
RAILROAD COMPANY
and UNION PACIFIC
RAILROAD COMPANY, DEFENDANT.

JUDGMENT ON JURY VERDICT

This action came before the Court for trial by jury, Honorable Susan Webber Wright presiding. The issues have been tried and the jury has rendered its verdict in favor of the defendants.

Therefore,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing by his complaint herein and the same is hereby dismissed with prejudice. Each party shall bear its own costs.

DATED this 14th day of May, 1991.

CARL R. BRENTS, CLERK

By
Suzanne L. Thompson
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

WILLIAM PAUL PLAINTIFF

VS. NO. LR-C-90-135

MISSOURI PACIFIC
RAILROAD COMPANY
AND UNION PACIFIC
RAILROAD COMPANY DEFENDANTS

VERDICT FORM

We, the jury, find in favor of the defendant.

SIGNED:
s/Jerry Brown
Foreperson

5-10-91
Date

(2)

No. 92-555

FILED
SEP 26 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

WILLIAM PAUL,
Petitioner

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

Respondent is Missouri Pacific Railroad Company. For purposes of Rule 29.1, Missouri Pacific Railroad Company operates a joint railway system with Union Pacific Railroad Company. Both Union Pacific Railroad Company and Missouri Pacific Railroad Company are indirect, wholly owned subsidiaries of the Union Pacific Corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In this case, the petitioner alleged in his Complaint that he had incurred a bilateral, noise induced hearing loss due to the negligence of the respondent. As pointed out by the District Judge in opening the case (Tr. 8), the claims at trial were that the petitioner had only suffered a unilateral hearing loss with a very mild loss in the left ear. The evidence at trial demonstrated that the hearing in the plaintiff's right ear was normal. In his statement of the case, the petitioner omits a discussion of the medical evidence supporting the conclusion that the

petitioner's hearing loss was caused by the failure of the petitioner to use hearing protection while hunting.

The only medical evidence submitted in this case was the testimony of Dr. John R.E. Dickins, a Little Rock, Arkansas otolaryngologist who examined the petitioner at the request of the petitioner's attorney. The audiometric testing done by Dr. Dickins demonstrated that the petitioner had sustained a mild high frequency hearing loss in his left ear, but that petitioner had normal hearing at all frequencies in his right ear. As Dr. Dickins testified, the audiometric pattern was atypical of occupational noise inducing hearing loss and was consistent with and more typical of hearing loss caused by gunfire. As he further indicated, use of a firearm over time results in a unilateral loss initially detected in the high frequencies. If a hunter is right handed (such as the petitioner), the hearing loss will exhibit itself in the left or opposite ear.

Petitioner testified that he wore hearing protection while using a four wheel vehicle at home. (Tr. 181) He claimed he was not aware that gun ammunition boxes contain warnings to utilize hearing protection. (Tr. 187) Yet, he claimed that he sometimes wore hearing protection while using his firearms. (Tr. 187) Petitioner described himself as a "semi collector" who owns twelve guns. (Tr. 193)

In his appeal to the Eighth Circuit, the petitioner did not challenge the sufficiency of the evidence regarding petitioner's lack of due care in protecting his hearing while hunting. Instead, the petitioner challenged the submission of the contributory negligence instruction as a matter of law.

REASONS FOR DENYING THE WRIT

THE DECISION BY THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT IS NOT CONTRARY TO ANY DECISION BY THE SUPREME COURT OR A COURT OF APPEALS

Petitioner seeks to argue that the remedial nature of the Federal Employers Liabiiity Act, 45 U.S.C. § 51 *et seq.*, when combined with the number of actions brought under the Act, necessitates a review of this decision. Respectfully, respondent submits that the Petition for Writ of Certiorari should be denied in that the decision by the Court of Appeals for the Eighth Circuit is not in conflict with any decision by this Court or any Court of Appeals. Petitioner admits as much at Page 17 of his Petition. Indeed, the Court of Appeals below recognized that, "The parties have not presented, nor has our research revealed, a case that addresses the definition of contributory negligence in a fact situation similar to this one." *Paul v. Missouri Pacific R. Co.*, 963 F.2d 1058, 1060 (8th Cir. 1992). The Court of Appeals correctly analyzed the distinction between a sudden, isolated event giving rise to an FELA claim and a long term occupational illness claim brought under the FELA.

45 U.S.C. § 53 (1982) states:

> [T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

In the case at bar, the jury was instructed on the elements of contributory negligence as well as the method of determining or diminishing damages if it found that the petitioner was contributorily negligent.[1] The jury returned a general verdict in favor of the respondent.

---

[1] Instruction No. 12—Affidmative Defense—Elements of Contributory Negligence. You must find the plaintiff contributorily

It is well established that "[W]hether an instruction on contributory negligence is proper in FELA cases depends upon the facts of the particular case . . . . A defendant is entitled to such an instruction to the jury if there is any evidence to support that theory." *Meyers v. Union Pacific*, 738 F.2d 328, 331 (8th Cir. 1984); see also, *Wilson v. Burlington Northern*, 670 F.2d 780 (8th Cir. 1982), *cert. den.*, 457 U.S. 1120. There can be little doubt that a reasonable person could conclude that Petitioner failed to exercise due care for his own condition resulting in hearing loss.

Petitioner references by footnote the decision in *Taylor v. Burlington Northern Railroad Company*, 787 F.2d 1309 (9th Cir. 1986) as including "dicta" that evidence of drug use may bear on the issue of contributory negligence. Taylor brought an action against his former employer Burlington Northern Railroad under the FELA alleging that harassment by a Burlington Northern foreman caused Taylor to suffer paranoid schizophrenia. The

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negligent if the defendant has proved all of the following elements by the preponderance of the evidence: First, the plaintiff failed to protect himself from exposure to harmful noise in his recreational activities; second, the plaintiff was thereby negligent; and third, such negligence of the plaintiff directly contributed to causing his injury. If any of the above elements have not been proved by the preponderance of the evidence, then the plaintiff was not contributorily negligent.

Instruction No. 14—Diminishing Damages Because of Contributory Negligence. If you find the plaintiff contributory negligent according to the Court's previous instructions, then you must diminish the [sic] any sum awarded in proportion to the amount of the negligence attributable to the plaintiff, and assess damages in the following manner: First, determine the amount of plaintiff's damages without reference to the question of his negligence; second, decide what proportion or percentage of the total combined negligence of both parties causing the injury consistent of the plaintiff's negligence; third, reduce by this proportion or percentage the amount of damages you would have awarded had the plaintiff's negligence not contributed to the injury.

District Court had refused to instruct the jury on comparative negligence. The Court of Appeals for the Ninth Circuit reversed and remanded the judgment of the District Court and concluded that the District Court had abused its discretion in refusing to give an instruction on comparative negligence. In addressing whether the plaintiff's own conduct, including drug use, was admissible, then Judge Kennedy wrote, "To the extent it was admissible, it may have borne on Taylor's contributory negligence. Taylor's own lack of due care for his own condition may have reduced Burlington's liability, and the jury should have been allowed to consider whether Taylor acted without due care." 787 F.2d at 1314.

CONCLUSION

The Eighth Circuit's opinion correctly affirmed the District Court's submission of contributory negligence in this case. Petitioner can demonstrate no conflict with other judicial decisions nor an explicit conflict with the language of the federal statute.

Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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